

A draft outline of a Bill of Rights

The purpose of this document is to describe in outline what a British Charter of Rights and Responsibilities might look like, and how its provisions might work.

The guiding principles which inform this framework document are that any modern British Charter must

- be distinctively British, defining the content of rights and responsibilities in a recognisably British way
- be based on explicitly articulated values
- put Parliament at the centre of its scheme
- improve and build upon the Human Rights Act by addressing its deficiencies
- supplement the protections in the European Convention on Human Rights
- acknowledge that individuals have responsibilities as well as rights and that the State also has responsibilities

The intention is to produce a detailed draft following discussion of this outline.

Preamble

The purpose of the Preamble would be twofold:

- (1) to state the purpose of adopting a modern Charter of Rights and Responsibilities, and
- (2) to articulate the values on which the Charter is founded, and to give them a distinctively British interpretation.

The tone of the Preamble should aim to be inspirational. It would not be legally enforceable but would act as an aid to interpretation of the Charter as well as a statement of values that could, for example, be taught in schools and reinforce the responsibilities owed by all. It might read, for example:

"This Charter of Rights and Responsibilities is adopted to give lasting effect to the values which we, the British people, consider to be fundamental:

- **Liberty, which for us means not self interested individualism but empowering individuals to realise their potential, free from both unwarranted restrictions and basic wants**

- Democracy, to give as much control to individuals over the decisions which affect their lives as is compatible with the general interest
- Fairness, the equal right of each and every individual to be treated with dignity and respect
- Civic duty, the responsibilities which we owe to each other, to our communities and to future generations to respect the rights and freedoms of others in a democratic society.”

The Charter itself could then be divided into two parts: Part I containing the provisions concerning how it would be interpreted and enforced, and Part II containing the Rights and Responsibilities themselves.

Part I: How the Charter of Rights and Responsibilities Operates

This Part of the Charter would contain the provisions which set up the machinery for its operation. It would be an opportunity to improve on the model of rights protection contained in the Human Rights Act, by giving Parliament an even more central role in the overall scheme.

1. Interpretation

A strong interpretation clause could seek to make the values underlying the Charter the touchstone of all law, by

- (1) requiring anybody interpreting the Charter itself (including public officials and judges) to strive to achieve its purpose and to give practical effect to the values underpinning it, as set out in the Preamble; and
- (2) requiring anybody interpreting other law (e.g. statutes and case-law) to do so in a way that is compatible with the Charter of Rights, so far as it is possible to do so. This is the approach used in the Human Rights Act.

The interpretation clause could also seek to further Britain's tradition of internationalism by requiring anybody interpreting the Charter to pay due regard to international law, including international human rights law.

2. Power of Legislative Override

This clause could make explicit (in a way that the Human Rights Act does not) that Parliament continues to have the power of “legislative override”, by expressly declaring in an Act of Parliament that the Act or any provision in it shall operate notwithstanding anything contained in the Charter. The Canadian Charter of Rights and Freedoms has an equivalent provision.

3. Limitation of Rights

The Charter could have a “general limitation clause” which makes clear that rights can be limited in the general interest, but only if such limitations are shown to be justified by reference to the underlying values identified in the Preamble. This is the approach used in Canada, New Zealand and South Africa.

4. Obligations

This clause would impose an obligation to act compatibly with the Charter on the legislature, the executive, the judiciary and any person or body in the performance of a public function. It could also define “public function” in a way which ensures that private organisations providing services under a contract with a public authority, in place of provision which would otherwise be made by the authority, are caught by the obligation, and so close the loophole opened up by judicial interpretation of the Human Rights Act contrary to Parliament’s clear intention at the time.

The clause could also give better effect than the Human Rights Act does to the “positive obligations” imposed by rights: that is, the requirement that the State take active steps to ensure that the rights in the Charter are effectively secured for everyone, and, in the case of some rights, the requirement that private parties also take responsibility for not breaching other people’s rights. The clause could do this by explicitly imposing an obligation on the State to take appropriate steps to secure effective protection for the rights in the Charter, which is the approach taken under the ECHR. It could also go further than the Human Rights Act currently does by providing that private parties must also act compatibly with the Charter Rights to the extent that those rights apply to them. Similar provision is made in the South African Bill of Rights.

5. Statements of compatibility

The Charter could take the opportunity to improve on the equivalent provision in the Human Rights Act by increasing the information provided to Parliament about whether a measure is compatible with the Charter of Rights and Responsibilities. Under s. 19 of the Human Rights Act ministers merely have to sign a certificate of compatibility. There is no requirement to give reasons for the minister’s view. To enhance democratic scrutiny of the compatibility of a Government measure with the Charter of Rights and Responsibilities, this clause could require ministers to provide full statements of compatibility, containing the reasons for the minister’s view that a measure is compatible with the Charter of Rights and Responsibilities, and extend its application to Government amendments to Bills and to other legislative measures such as statutory instruments and Orders in Council.

6. Enforcement

This clause would define who would be entitled to bring legal proceedings concerning the alleged breach of any provision in the Charter. The Human Rights Act restricts this to those who are "victims" of Convention violations. Other jurisdictions (e.g. South Africa) use a wider test closer to the "sufficient interest" test which governs who can apply for judicial review against public authorities. This clause could use the same test as already applies to judicial review, in the interests of making the rights contained in the Charter more practically accessible to those without the resources to litigate on their own behalf.

7. Remedies

This clause would define the remedies available to a person whose Charter rights have been unjustifiably interfered with. The clause could broadly follow the equivalent provisions of the Human Rights Act, giving courts and tribunals the discretion to award such remedy, within its powers, as it considers just and appropriate and necessary to provide an effective remedy. It could provide for a declaration of incompatibility where primary legislation is incompatible, and for such legislation to continue in force notwithstanding the declaration of incompatibility.

8. Process following declaration of incompatibility

The Charter could seek to enhance Parliament's role following a declaration of incompatibility. Under the Human Rights Act it is up to the Government to decide whether to remedy a judicially declared incompatibility and if so, how. This clause could give Parliament a greater role by requiring the Government to bring forward, within a tightly defined timetable, a formal response to Parliament, indicating whether and if so how it intends to respond to the declaration of incompatibility. This would be an improvement on the present position because it would guarantee Parliament an opportunity to express its view about the declared incompatibility of its legislation.

9. Relationship with European Convention on Human Rights

This clause would address the relationship between the Charter and the ECHR, making clear that where rights in the Charter correspond to rights in the ECHR they must be interpreted as having at least the same scope as the ECHR rights, but that Charter rights can be interpreted as providing more extensive protection than corresponding ECHR rights: in other words, that the ECHR is "a floor not a ceiling."

The clause would also make clear that limitations on Charter rights under the general limitation clause could not be more extensive than limitations which are permissible under the ECHR.

The rights in Part II of the Charter could be defined sufficiently broadly to include all of the relevant ECHR rights within their scope. Alternatively, if this were thought to leave scope for confusion, the ECHR rights could be included in a schedule to the Charter.

10. Relationship with other existing rights

This clause would address the relationship between the Charter and other existing rights, making clear that nothing in the Charter denies the existence or restricts the scope of existing rights or freedoms already recognised by statute, common law or customary international law.

11. Responsibility not to abuse rights

This clause would lay down a clear responsibility on the holders of rights not to abuse those rights by making clear that nothing in the Charter implies any right to do anything aimed at the destruction of any of the rights and freedoms in the Charter or at their limitation to a greater extent than is provided for in the Charter. The ECHR contains a similar provision which has been relied on by the Court of Human Rights when upholding, for example, convictions for the offence of incitement to racial hatred.

12. Emergencies

The purpose of this clause would be to make clear that certain rights in the Charter can be derogated from in situations of emergency, but the clause could seek to enhance the role of Parliament in the process by requiring that a state of emergency must first be declared by Act of Parliament before any derogations from Charter rights can be made. It could also enhance Parliament's role by stipulating a strict time limit on the duration of such a declaration of a state of emergency and of any emergency legislation.

The clause would prescribe the conditions that have to be satisfied for a state of emergency to be declared (e.g. a serious threat to the life of the nation), and the criteria for any derogation to be valid (e.g. derogation may only be to the extent strictly required by the emergency and consistent with international obligations).

Part II: The Rights and Responsibilities

This part of the Charter would contain the substantive rights and responsibilities.

The rights would be defined in such a way as to include ECHR rights plus some others which the UK is already bound in international law to protect but supplemented where necessary to reflect the higher level of protection already accorded to those rights (or desired to be accorded to them) in UK law compared

to the international standards (e.g. the much more detailed safeguards for those arrested or detained, already established in the Police and Criminal Evidence Act and Codes of Practice; the more extensive guarantees of procedural fairness in administrative proceedings, long established in UK administrative law; and the right to education which in practice exceeds the much weaker right defined in international standards).

The responsibilities would be defined in such a way as to include all those positive obligations and responsibilities already imposed on the State and individuals by international law, again supplemented where necessary to spell out additional duties and responsibilities already well established in the UK. Where a particular right imposes special responsibilities on the holder or duties on individuals or the State, above and beyond the general responsibilities and duties identified in Part I, this could be made explicit (e.g. perhaps the special responsibility on employers and providers of goods, services and facilities not to discriminate, already well established in our anti-discrimination legislation; the special responsibility on data controllers to process personal data fairly and only for legitimate purposes, already established in our data protection legislation; and the special responsibility on individuals and the media not to exercise their right of freedom of expression in a way which is aimed at destroying the Charter rights of others, already established in our incitement to racial hatred laws).

Depending on the scope of the Bill, the rights and responsibilities could be divided into five broad groups:

- Civil and political rights and responsibilities
- Fair process rights and responsibilities
- Social and economic rights and responsibilities
- Rights of and responsibilities to particular groups
- Democratic rights and responsibilities

A. Civil and Political Rights and Responsibilities

The rights and responsibilities in this group could include the following (equality coming first in order to make it clear that in this Charter it is the foundational value, compared to the ECHR as originally drafted in which it is parasitic on the other rights).

Equality

Dignity

Life

Physical and mental integrity

Torture and inhuman or degrading treatment or punishment

Slavery and forced labour

Liberty

Private and family life, home and communications

Freedom of thought, conscience and religion

Freedom of expression

Freedom of association

Right of assembly and demonstration

Right to marry

Right to found a family

Property

Freedom of movement and residence

Right to asylum

B. Fair Process Rights and Responsibilities

The rights and responsibilities in this section would be mainly concerned with procedural guarantees governing how people are treated. They could include:

Rights of arrested and detained persons

Right to a fair criminal trial

Prohibition on retrospective offences

Right of access to court

Right to a fair hearing

Right to effective remedy

Access to information

Fair and just administrative action

C. Social and Economic Rights and Responsibilities

This section of the Charter could combine a set of certain minimum rights directly enforceable through the courts, reflecting the very considerable extent to which there are already enforceable duties on the State to make certain provision, with duties on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the various rights and goals spelt out in this section. The South African Bill of Rights takes this combined approach and the case law of the South African Constitutional Court demonstrates that this does not lead to courts taking decisions about the rationing of scarce resources.

It could also impose a requirement that the Government report annually to Parliament on the progress made during the previous year in realising the rights and goals in this section.

The rights and responsibilities which could be covered include the following:

Health care

Education

A healthy and sustainable environment

An adequate standard of living

Independent living

Housing

Work

Employment rights

D. Rights of and Responsibilities to Particular Groups

The Charter could include a section which makes more detailed provision for the rights and responsibilities owed to particular groups with particular vulnerabilities, again based on a combination of international obligations and well established provision for such groups in our own law. Within this section could be obligations owed by one group to another e.g. duty of protection owed by parents and carers

to children or duty of adult carers to respect the dignity of those they care for . The groups covered could include:

Minorities

Children

People with disabilities

Carers

Victims

E. Democratic Rights and Responsibilities

In this section the Charter could include the important set of rights and responsibilities which govern participation in the democratic process, including:

Responsibility to hold free and fair elections

Right to vote and to stand as a candidate at elections

Right to participate in public life

Citizenship